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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

PACIFIC COAST FEDERATION OF FISHERMEN'S ASSOCIATIONS, et al.,

Plaintiffs,

v.

DONALD R. GLASER, Regional Director of the U.S. Bureau of Reclamation, U.S. BUREAU OF RECLAMATION, and SAN LUIS & DELTA-MENDOTA WATER AUTHORITY,

Defendants.
_____/

No. 2:11–cv–02980–KJM–CKD

FEDERAL DEFENDANTS' MOTION TO DISMISS PLAINTIFFS' COMPLAINT PURSUANT TO FED. R. CIV. P. 12(c), AND MEMORANDUM OF LAW IN SUPPORT THEREOF

Date: April 27, 2012
Time: 10:00 a.m.
Courtroom: 3
Judge: Hon. Kimberly J. Mueller

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Federal Defendants Donald R. Glaser and the Bureau of Reclamation ("Reclamation") hereby move pursuant to Federal Rule of Civil Procedure 12(c) for judgment on the pleadings. Plaintiffs' Complaint is founded on a misreading of the federal Clean Water Act and its exemption of irrigation return flows from discharge permit requirements, and should be dismissed with prejudice.[1/]

I. BACKGROUND

A. The Federal Clean Water Act

In the Clean Water Act (the "CWA" or "Act"), 33 U.S.C. §§ 1251-1387, Congress created a program to restore and maintain the quality of the nation's waters, relying primarily on a system that prohibits the discharge of pollutants to waters of the United States except in compliance with a National Pollutant Discharge Elimination System ("NPDES") permit issued by the United States Environmental Protection Agency ("EPA") or a state under CWA section 402, 33 § U.S.C. § 1342.[2/] CWA section 502(12) defines "discharge of a pollutant" to mean "any addition of any pollutant to navigable waters from any point source." 33 U.S.C. § 1362(12).

CWA section 502(14), in turn, defines "point source" to include "any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, [or] discrete fissure . . . from which pollutants are or may be discharged." 33 U.S.C. 1362(14). However, that section expressly excludes "return flows from irrigated agriculture" from the definition of "point source." *Id.* Relatedly, another section of the Act expressly exempts irrigation return flows from NPDES permitting requirements: "The Administrator shall not require a permit under this section for discharges composed entirely of return flows from irrigated

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[1/] Co-defendant San Luis & Delta-Mendota Water Authority (the "Authority") has also moved to dismiss the Complaint. *See* Dkt 17. Federal Defendants' current Rule 12(c) motion and the Authority's 12(b) motion are calendared together for argument on April 27, 2012. *See* Dkt 35.

[2/] Much of the responsibility for administering the NPDES permitting system has been assumed by the states, including California. *See* 33 U.S.C. § 1342(b); Cal. Water Code § 13370 (expressing California's intent to implement its own NPDES permit program).

agriculture. . . . " *Id.* § 402(*l*), 33 U.S.C. § 1342(*l*). EPA's implementing regulations, found at 40 C.F.R. § 122.3 ("Exclusions"), provide in relevant part: "The following discharges do not require NPDES permits: (f) Return flows from irrigated agriculture." *See also* 40 C.F.R. § 122.2 ("point source" "does not include return flows from irrigated agriculture or agricultural storm water runoff").[3/]

B. The Grassland Bypass Project

The Complaint (¶ 3) mentions the Grassland Bypass Project ("Project"), but provides no explanation of the Project's origins and purposes. However, Plaintiffs' June 7, 2011 60-Day "Notice of Intent to Sue" letter – attached to the Complaint as "Ex. 1" and incorporated therein by reference (Cmplt. ¶ 10) – discusses the Project.[4/]

As set forth in the 60-Day Notice (at 2), in parts of the San Joaquin Valley known as the "Grassland Area" "deep percolation of groundwater is inhibited by the hydraulic properties of soils and other subsurface materials." *Id.* (quoting from *Final Biological Opinion* ("*BiOp.*") for the Project, issued in 2001 by the U.S. Fish and Wildlife Service).

> As a result, the groundwater table rises, potentially threatening crop production (through flooding of the root zone, often with saline water). Evaporation and capillary action also can draw dissolved solids in shallow groundwater to the surface, resulting in salinization of the soils. High salinity in shallow groundwater and/or soils adversely affects agricultural productivity by reducing crop yields and limiting the diversity of crops that can be grown [cite].

Id. The BiOp explains that for irrigated agriculture in the Grassland Area to be "productive and sustainable," the "groundwater table must not be allowed to rise into the crop root zone for extended periods of time and a salt balance must be achieved and maintained. *Id.*

[3/] In this context, the terms "exclusion" and "exemption" are synonymous.

[4/] In assessing whether a complaint states a cause of action, the Court may properly take into consideration matters that are incorporated into the complaint by reference. *See, e.g., Callaway v. Worthington Industries*, No. CIV-S-10-3351-KJM, 2011 U.S. Dist. LEXIS *108799, at * 5 (E.D. Cal. Sept. 23, 2011) (citing cases).*

The 60-Day Notice (*id.*) states that in the 1950s and 1960s, Grassland Area farmers installed "subsurface drainage systems" in order to convert "drainage-impaired" soils into arable farmland. The 60-Day Notice (*id.* at 2-3) then states that the water collected in those agricultural subsurface drainage systems flowed into local sloughs and creeks en route to the San Joaquin River, ultimately polluting certain downstream wetland and wildlife refuge areas with naturally-occurring – but potentially harmful – salts, boron, and selenium. *Id.* at 3. After the discovery of avian development abnormalities at Kesterson National Wildlife Refuge that were believed to be linked to elevated concentrations of the above salts and trace elements, refuge managers in 1985 stopped using agricultural drainwater as a "water supply for the Grassland's public and private wetlands." *Id.* The Notice states that after a series of attempts to "resolve" the Grassland Area's agricultural drainage problems, the federal government "instituted" the Project, which is designed and functions to "bypass" the above-mentioned wetlands and wildlife management areas and re-direct the flows into a portion of the San Luis Drain and then into Mud Slough. *Id.*[5/]

Plaintiffs 60-Day Notice (*id.* at 6) cites and quotes from an April 2000 Staff Report prepared by the California Environmental Protection Agency, Regional Water Quality Control Board, Central Valley Region ("Regional Board"). Discussing agricultural drainage operations in the Grassland Area, the report summarizes the linkage between irrigation, the shallow groundwater, and crop production:

> Dry conditions make irrigation necessary for nearly all crops grown commercially in the watershed. Irrigation of soils derived from marine sediments leaches selenium into the shallow groundwater. Subsurface drainage is produced when farmers drain the salty groundwater from the root zone to protect their crops.

The 60-Day Notice (at 6-7) asserts that this subsurface drainage consists of not "just irrigation

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[5/] The drainage flows at issue are carefully monitored by regulatory authorities. Monthly water quality reports are published by the San Francisco Estuary Institute that list data collected by Reclamation, the Regional Board, the U.S. Fish and Wildlife Service, California Department of Fish and Game, the San Luis & Delta-Mendota Water Authority, and the U.S. Geological Survey. *See* 60-Day Notice at 4.

return flows" but also "groundwater," and that "any discharge that is not made up 'entirely' of agricultural return flows is not exempt" from NPDES permitting under the CWA (citing 33 U.S.C. § 1342(*l*)(1)).

C. The Complaint

Plaintiffs' Complaint, filed November 9, 2011, is brought as a citizen suit under CWA section 505, 33 U.S.C. § 1365(a). Complt. ¶ 9. It alleges that Defendants collect "polluted groundwater" from agricultural "tile drainage systems" – which Plaintiffs describe as a "parallel network" of perforated drain laterals buried at depths ranging from 6 to 9 feet below land surface and spaced horizontally from 100 to 600 feet apart – and then discharge that polluted water from the drainage area through the Project's "canals, pipes, and ditches, point sources, into waters of the United States, including the San Luis Drain and Mud Slough, without an NPDES permit," allegedly in violation of CWA section 402(a)(1), 33 U.S.C. § 1342(a). Cmplt. ¶¶ 26, 33, 39-40. While acknowledging that "agricultural return flows are exempt from the CWA's permit requirements" (citing section 502(14)), Plaintiffs contend that the discharges in question "consist mostly of groundwater, not agricultural return flows," and that, therefore, the "agricultural return flows exemption does not apply and defendants are in violation of the CWA because they have not obtained an NPDES permit." *Id.* ¶ 36. In their Claim for Relief, Plaintiffs ask this Court to, among other things, enjoin Defendants from operating the Project or "initiating any activities in furtherance of the Project that could result in any change or alteration of the physical environment unless and until defendants comply with the requirements of the CWA and its implementing regulations." *Id.* ¶ 43. Federal Defendants answered the Complaint on January 9, 2012. *See* Dkt 15.

II. LEGAL STANDARD GOVERNING RULE 12(c) MOTIONS

A Rule 12(c) motion for judgment on the pleadings challenges the legal sufficiency of the opposing party's pleadings, and is "appropriate when, even if all material facts in the pleading under attack are true, the moving party is entitled to judgment as a matter of law." *Coal. for a*

Sustainable Delta v. Carlson, No. 1:08-cv-00397, 2008 WL 2899725, at *1 (E.D. Cal. July 24, 2008). The standard governing a Rule 12(c) motion is "essentially the same" as that governing a Rule 12(b)(6) motion. *See Dworkin v. Hustler Magazine, Inc.*, 867 F.2d 1188, 1192 (9th Cir. 1989) ("The principal difference between motions filed pursuant to Rule 12(b) and Rule 12(c) is the time of filing. . . . [Otherwise,] the motions are functionally identical.").

For purposes of this motion for judgment on the pleadings, Federal Defendants accept as true the Complaint's core allegations that: (1) the drained farmlands at issue are underlain by agricultural tile drainage systems consisting of a parallel network of perforated buried drain laterals, whose purpose is to make the farmland arable for crop production (Cmplt. ¶ 26); (2) agricultural tile drain flow increases as the water table rises and decreases as the water table declines, and is comprised of "polluted groundwater along with irrigation water" (*id.*); (3) the agricultural tile drains empty into drainage ditches, which flow into the San Luis Drain and then into Mud Slough, and ultimately into the San Joaquin River and Bay Delta (*id.* ¶ 28); and (4) Defendants do not have an NPDES permit for these agricultural drainage flows into the San Luis Drain or into Mud Slough, *id.* ¶ 4, and neither the State nor EPA has required Defendants to obtain such a permit or commenced an enforcement action against Defendants for not obtaining such a permit. *Id.* ¶ 12.[6/]

III. THE COMPLAINT FAILS TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED AND FEDERAL DEFENDANTS ARE ENTITLED TO JUDGMENT AS A MATTER OF LAW

This case is appropriate for resolution on the pleadings because even viewing the facts as presented in the pleadings in the light most favorable to Plaintiffs and accepting those facts as true, Federal Defendants (and the Authority) are entitled to judgment as a matter of law. The

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[6/] Federal Defendants do not accept as true for purposes of this motion allegations in the Complaint that incorporate or are tantamount to legal conclusions. For example, the Complaint (¶ 5) alleges that the Defendants "discharge" polluted water into waters of the United States. The term "discharge" is defined in CWA section 502(12) as the "addition of any pollutant to navigable waters" from "any point source," but the definition of "point source" in section 502(14) expressly excludes "return flows from irrigated agriculture." Thus, agricultural return flows are not properly considered point-source discharges that do not require a permit; they are not point source discharges at all.

agricultural drainage flows at issue are not "point sources" under the CWA and in any event are statutorily exempt from NPDES permit requirements.

A. History Of The CWA's Exclusion For Agricultural Irrigation Return Flows

As originally enacted in 1972, the CWA did not include an express permit exclusion for return flows from irrigated agriculture. However, in 1973 EPA promulgated NPDES regulations, which exempted discharges from several classes of point sources from NPDES permit requirements, specifically including "irrigation return flow" "such as tailwater, tile drainage, surfaced groundwater flow or bypass water," whether operated by public or private organizations or individuals, from areas of less than 3,000 contiguous acres or 3,000 noncontiguous acres that use the same drainage system. 40 C.F.R. § 125.4(j)(4) (1973).

On November 16, 1977, the Court of Appeals for the District of Columbia Circuit issued a decision holding that the EPA lacked authority to exclude irrigation return flows from the definition of "point source." *NRDC v. Costle*, 568 F.2d 1369, 1382 (D.C. Cir. 1977), *aff'g NRDC v. Train*, 396 F. Supp. 1393 (D.D.C. 1975).[7] In direct response to *NRDC*, Congress amended the CWA the following month by inserting the current irrigation flows exceptions in the Act. *See* Pub. L. No. 95-217, § 33(b), 91 Stat. 1577 (Dec. 27, 1977). Unlike EPA's overturned 1973 regulatory exclusion, Congress's 1977 statutory exclusion does not limit the scope of the exclusion to small drainage areas. Nor does the statutory exclusion list various types of irrigation return flows – i.e., tailwater, tile drainage, surfaced groundwater flow, and bypass water; instead, it broadly sweeps in all "return flows from irrigated agriculture."[8]

The timing of the adoption of this exception is indicative of Congress's concern with

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[7] The D.C. Circuit in *NRDC v. Costle* noted that prior to passage of the CWA, the House of Representatives considered but rejected a proposed amendment that was "designed to avoid the problems of including irrigation return flows in the permit program." 568 F.2d at 1376 n.17.

[8] This case primarily implicates two of these varieties of irrigation return flows: tile drainage and surfaced groundwater flow. The Complaint does not cite either "tailwater" (excess surface water draining especially from a field under cultivation – *see* http://www.merriam-webster.com/dictionary/tailwater) or "bypass water" (a channel carrying water around a part and back to the main stream – *see* http://www.merriam-webster.com/dictionary/bypass).

limiting the reach of the Act in the field of agriculture, whether due to the importance of such activity to society or due to the difficulty of regulating irrigation flows, or both.[9] For example, the legislative history shows that in so amending the CWA, Congress intended to ensure a level playing field between irrigated and non-irrigated agriculture. This goal was expressed during Senate debate on the amendment as intended to "correct[] what has been a discrimination against irrigated agriculture." 3 *Legislative History of the Clean Water Act of 1977* ("*Legis. Hist.*"), at 527. Debate in the House of Representatives noted that "[t]his amendment promotes equity of treatment among farmers who depend on rainfall to irrigate their crops and those who depend on surface irrigation which is returned to a stream in discrete conveyances." 4 *Legis. Hist.* at 882. The Senate noted favorably the existence of the CWA section 208 program, which does not require an NPDES permit to address water quality concerns from irrigation return flow: "All such [irrigation return flow] sources, regardless of the manner in which the flow was applied to agricultural lands, and regardless of the discrete nature of the entry point, are more appropriately treated under the requirements of section 208(b)(2)(F)." S. Rep. No. 95-370, at 35, *reprinted in* 4 Legis. Hist. at 668.[10]

In enacting the exclusion, Congress also recognized the significant burden that would be placed on EPA and the states if NPDES permits were required for irrigation return flows. *See* 3 *Legis. Hist.* at 318 ("The problems of permitting every discrete source or conduit returning water to the streams from irrigated lands is simply too burdensome to place on the resources of EPA."). The Ninth Circuit recently alluded to this legislative concern in *Northwest Environmental Defense Center v. Brown*, 640 F.3d 1063 (9th Cir. 2011) (discussing enactment of CWA §§ 402(*l*) and 502(14), 33 U.S.C. §§ 1341(*l*) & 1362(14), *petition for cert. filed*, 80 U.S.L.W. 3142 (U.S. Sept.

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[9] The CWA does not provide a blanket exception for all agricultural activities. For example, the Act expressly includes a "concentrated animal feeding operation" (or "CAFO") within the definition of "point source." Section 502(14), 33 U.S.C. § 1362(14).

[10] Section 208(b)(2)(F) establishes a *non*-NPDES program for addressing various nonpoint sources of pollution, "including return flows from irrigated agriculture, and their cumulative effects." 33 U.S.C. § 1288(b)(2)(F).

13, 2011) (No. 11-338, 11A 146, 11-347, 11 A 156). The Court of Appeals stated:

> Recognizing the burden on EPA, as well as on some of the entities subject to the NPDES permitting requirement, Congress subsequently narrowed the definition of point source discharge by providing specific statutory exemptions for certain categories of discharges. For example, in 1977, Congress exempted return flows from irrigated agriculture to alleviate the EPA's burden in having to permit "every source or conduit returning water to the streams from irrigated lands," which was what the text of the statute had required. 123 Cong. Rec. 38949, 38956 (Dec. 15, 1977) (Statement of Rep. Roberts).

640 F.3d at 1085.

With respect to section 402(*l*)(1) – EPA "shall not require a permit under this section for discharges composed *entirely* of return flows from irrigated agriculture" (emphasis added) – the Senate Report stated:

> In using the word "entirely," the committee "did not intend to differentiate among return flows based on their content. The word "entirely" was intended to limit the exception to only those flows which do not contain additional discharges from *activities unrelated to crop production.*

123 Cong. Rec. at 35 (1977), S. Rep. No. 95-370 (emphasis added).

Thus, for example, if an unpermitted waste stream emanating from a factory or a CAFO is added to irrigation return flow, the combined flow would no longer qualify for the exclusion because it contains pollutants from activities "unrelated to crop production." *See also* EPA's *NPDES Permit Application Regulations for Storm Water Discharges*, 55 Fed. Reg. 47,990, 47,996 (Nov. 16, 1990) (discharge component from industrial facility that is included in a "joint" discharge with irrigation flow may be regulated pursuant to an NPDES permit either at the point at which industrial flow enters or joins the irrigation flow or where the combined flow enters waters of the United States).

B. The Flows At Issue Are Properly Considered Return Flows From Irrigated Agriculture And Are Therefore Exempt From NPDES Permitting

The dual CWA exclusions of agricultural irrigation return flows from the definition of "point source" (in section 502(14)) and from NPDES permitting (in section 402(*l*)(1)) are dispositive of any claim that operation of the tile drainage systems in question here requires an

NPDES permit. The State of California, which has NPDES authority under the CWA, does not require these agricultural drainage flows to obtain an NPDES permit. Instead the flows are regulated through a "Waste Discharge Requirements Order" (or "WDR") issued by the Regional Board pursuant to California's Porter-Cologne Water Quality Control Act, Cal. Water Code Ann. §§ 13260-13274.[11/] Nor has any court ever held that these drainage flows (or comparable flows elsewhere in the Nation) require an NPDES permit.

Yet Plaintiffs take the position that an NPDES permit is required here. As set out in their Complaint and 60-Day Notice, their theory is that (a) the irrigation of Grassland Drainage Area soils derived from marine sediments leaches salts, selenium and other contaminants into the shallow "groundwater," which farmers drain to protect their crops when that water reaches the root zone; and (b) because the drainage system flows include groundwater in addition to "irrigation water," the drainage flows lose the NPDES permit exclusion because those flows do not consist "entirely" of irrigation return flows.

Plaintiffs' legal theory is fatally flawed. The statutory exclusion is intended to cover all drainage water from irrigated farmlands that re-enters the water system to be used further downstream. Congress was well aware (from the text of EPA's 1973 overturned regulation, *supra* at 6) (40 C.F.R. § 125.4(j)(4)), that irrigation return flows are understood to include not just "tile drainage" but also "surfaced ground water flow." Congress did not exclude either of these types of irrigation drainage – or any other type – from the exclusion. The legislative history makes clear that in using the word "entirely" in connection with "return flows from irrigated agriculture," Congress wanted to ensure that an irrigation flow would no longer qualify for the exclusion if it contained unpermitted discharges from activities "unrelated to crop production." S. Rep. No. 95-370 at 4360. And nothing in that history supports the notion that Congress intended to carve out of

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[11/] The WDR for the Project (at 10, ¶ 30) – states that the "discharge of subsurface agricultural drainage, tailwater and storm water from agricultural lands to surface water does not require an NPDES permit."

the exclusion agricultural drainage that includes any "groundwater," presumably even a single molecule.

The Eleventh Circuit's decision in *Fishermen Against Destruction of Environment, Inc. v. Closter Farms, Inc.*, 300 F.3d 1294 (11th Cir. 2002), is instructive. The plaintiff in that CWA citizen suit alleged that defendant Closter Farms – which used canals to irrigate its sugar cane farm through "flood irrigation," a process in which water is forced into the cane fields by raising water levels in the canals – was violating the Act by discharging pollutants into Florida's Lake Okeechobee without an NPDES permit. The district court dismissed, finding that while Closter Farms was discharging pollutants into Lake Okeechobee through a culvert, the plaintiffs had "failed to establish the addition of a pollutant which would not be exempt." 300 F.3d at 1296.

The Court of Appeals affirmed. It noted that the district court had found that although Closter Farms was polluting Lake Okeechobee, it had "complied with the established legislative scheme."

> Although the district court failed to make explicit findings as to the source of the pollutants, implicit in the decision are two conclusions: (1) any pollutants that originated on Closter Farms fall within the agricultural exemptions to the CWA, and (2) any pollutants that originated elsewhere were allowed by an NPDES permit or an exemption to the permitting requirements.

Id. at 1297.

With respect to the first conclusion, regarding the applicability of the CWA's agricultural exemptions, the Appeals Court stated that the plaintiff contended that the discharged water was neither "stormwater discharge" nor "return flows from irrigation agriculture," and therefore Closter Farms had been illegally discharging pollutants without a permit. 300 F.3d at 1297. Analyzing that issue, the Court of Appeals observed that the sources of the water being pumped into Lake Okeechobee were: (1) rainfall, (2) groundwater, and (3) seepage from the lake. *Id.* The court held that "the discharged groundwater and seepage can be characterized as 'return flow from irrigation agriculture.'" *Id.* The court explained that the water that had seeped into the canals from Lake Okeechobee, either above or below ground, had been used in the irrigation process and therefore

discharging it back into the lake was a "return flow." *Id.* The Eleventh Circuit agreed with the district court that any pollutants that originated within Closter Farms could lawfully be discharged into Lake Okeechobee by Closter Farms without an NPDES permit. *Id.* at 1297-98. That some of those pollutants were contributed via "groundwater" was without legal consequence.[12/]

Plaintiffs' argument here appears to be that only 100 percent "irrigation water" – meaning water that is applied to the land by farmers to irrigate crops – that goes directly into the drainage tiles without commingling with any other "type" of water, such as groundwater or rainwater, qualifies for the agricultural drainage exemption. Under Plaintiffs' theory, if any water whatsoever seeps into the agricultural drainage system from below the tiles ("groundwater" as they conceive of it), or from above through rainfall or other forms of precipitation, the exclusion is forfeited because the agricultural drain flows are not made up "entirely" of "irrigation" water.

Plaintiffs' argument makes little sense. First, there is nothing in the legislative history that suggests that Congress intended such a cramped reading of the exclusion. To the contrary, Congress acted promptly to expressly exclude (in two separate and complementary statutory provisions) flows from irrigated agriculture from NPDES permitting after the D.C. Circuit struck down EPA's prior, and more limited, exclusion. Congress's use of the word "entirely" in section 402(*l*)(1) was not meant to limit the exclusion based upon whether the agricultural drainage system in question lies under or on the surface of the farmlands, or on whether some of the water being drained to facilitate crop production emanates from precipitation or a rising water table; rather, it was meant to eliminate a possible loophole for industrial operations and CAFOs. The critical question is whether the drainage flows are related to crop production, and here they indisputably

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[12/] With respect to the second issue raised in the Florida case – whether pollutants from "non-agricultural" activities conducted on properties adjacent to Closter Farms had been added to the irrigation return flows – the Court of Appeals noted that while such pollutants would not fall within the agricultural exemptions, there was insufficient evidence in the record that Closter Farms had discharged any non-agricultural pollutants into Lake Okeechobee. The Court of Appeals rejected as speculation various assertions that a nearby waste treatment plant or septic tanks might be a relevant source of pollution. 300 F.3d at 1298.

are. After all, the farmlands are being drained specifically in order to make the lands arable.

Second, Plaintiffs themselves posit that the "groundwater" here is contaminated as a result of irrigation practices that "leach" contaminants from soils that are derived from marine sediments. *See supra* at 3. Plaintiffs cannot explain why – or at what point – irrigation water that percolates below the land's surface should no longer be considered "irrigation water."

Third, under Plaintiffs' theory, it would be all but impossible to avail oneself of the exclusion. The exclusion would not apply except in the most arid desert, bereft of any precipitation, because if any precipitation were to fall on the land and percolate below the land's surface into the water table, the drainage flows would, according to Plaintiffs, no longer be composed "entirely" of "irrigation water."

Fourth, under Plaintiffs' theory, no subsurface drain would ever qualify for the exclusion because even if 100 percent of the flow in such a drain could somehow be proven to be from downward-percolating irrigation water (as compared to rainwater percolating downward, or to the water table rising, or simply to water already extant in the soils), by definition buried drains (such as those at issue here) remove water that is located below the surface of the land, *i.e.* a type of "groundwater." *See, e.g., Mapco Alaska Petroleum, Inc. v. Central Nat'l Ins. Co. of Omaha*, 795 F. Supp. 941, 945 n.6 (D. Alaska 1991) ("groundwater" is defined as 'water within the earth that supplies wells and springs; water in the zone of saturation where all openings in rocks and soil are filled, the upper surface of which forms the water table.' *Webster's Third New International Dictionary* 1004 (1981)."

In sum, if Plaintiffs believe that the agricultural drainage flows at issue would be better regulated under the NPDES program, their remedy lies with Congress, not with this Court. Under current law, in effect since 1977, the flows at issue are exempt from federal permitting requirements.

CONCLUSION

For the foregoing reasons, Federal Defendants' motion for judgment on the pleadings should be granted and Plaintiffs' Complaint dismissed.

Dated: March 16, 2012

Respectfully submitted,

IGNACIA S. MORENO
Assistant Attorney General
Environmental and Natural Resources Division

/s/ *Martin F. McDermott*
MARTIN F. MCDERMOTT
United States Department of Justice
Environmental Defense Section
Counsel for Federal Defendants

CERTIFICATE OF SERVICE

I, Martin F. McDermott, hereby certify that a true and correct copy of the foregoing FEDERAL DEFENDANTS' MOTION TO DISMISS PLAINTIFFS' COMPLAINT PURSUANT TO FED. R. CIV. P. 12(c), AND MEMORANDUM OF LAW IN SUPPORT THEREOF was served by Notice of Electronic Filing this 16th day of March, 2012, upon all current counsel of record using the Court's CM/ECF system.

/s/ *Martin F. McDermott*, Attorney

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

PACIFIC COAST FEDERATION OF FISHERMEN'S ASSOCIATIONS, et al.,

Plaintiffs,

v.

DONALD R. GLASER, Regional Director of the U.S. Bureau of Reclamation, U.S. BUREAU OF RECLAMATION, and SAN LUIS & DELTA-MENDOTA WATER AUTHORITY,

Defendants.
_____/

No. 2:11–cv–02980–KJM–CKD

[PROPOSED] ORDER GRANTING FEDERAL DEFENDANTS' MOTION TO DISMISS PLAINTIFFS' COMPLAINT PURSUANT TO FED. R. CIV. P. 12(c), AND MEMORANDUM OF LAW IN SUPPORT THEREOF

Date: April 27, 2012
Time: 10:00 a.m.
Courtroom: 3
Judge: Hon. Kimberly J. Mueller

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The agricultural drainage flows at issue are not "point sources" under the Clean Water Act ("CWA") and in any event are statutorily exempt from CWA National Pollutant Discharge Elimination System permit requirements. *See* CWA sections 402(*l*)(1) and 502(14), 33 U.S.C. §§ 1342(*l*)(1) & 1362(14).

WHEREFORE, Federal Defendants' motion for judgment on the pleadings is GRANTED and Plaintiffs' Complaint is dismissed, with prejudice.

IT IS SO ORDERED.

Dated: _____

_____
UNITED STATES DISTRICT JUDGE

Respectfully submitted March 16, 2012, by:
IGNACIA S. MORENO
Assistant Attorney General
Environmental and Natural Resources Division

/s/ *Martin F. McDermott*
MARTIN F. MCDERMOTT
United States Department of Justice
Environmental Defense Section
Counsel for Federal Defendants

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/s/ *Martin F. McDermott* , Attorney